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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 AARON WILLIAMS, on behalf of himself
12 and all others similarly situated,

13 Plaintiff,

14 v.

15 PILLPACK LLC,

16 Defendant.

17 CASE NO. 3:19-cv-05282-DGE
18 ORDER DENYING
19 DEFENDANT'S MOTION FOR
20 SUMMARY JUDGMENT (DKT.
21 NO. 252)

22 **I INTRODUCTION**

23 This matter comes before the Court on Defendant PillPack LLC's ("PillPack") Motion
24 for Summary Judgment. (Dkt. No. 252.) The Court has considered the pleadings filed in support
of and opposition to the motion and the remainder of the record and DENIES Defendant's
motion for the reasons discussed herein.

25 **II BACKGROUND**

26 The Court has discussed the factual and procedural background in previous orders and
27 incorporates them by reference. (Dkt. Nos. 140 at 1–4; 220 at 1–9.) Plaintiff Aaron Williams

1 alleges that on March 14 and April 10, 2019, he received calls from a telemarketer using a
 2 prerecorded voice message asking if he was interested in a pharmacy service that ships
 3 medications directly to his house. (Dkt. No. 6 at 1.) When Williams expressed interest in the
 4 service, the call was transferred to a PillPack sales representative. (*Id.* at 3.) Williams argues the
 5 calls were made in violation of two subsections of the Telephone Consumer Protection Act of
 6 1991, 47 U.S.C. § 227 et seq. (“TCPA”): 1) calls made using an automated telephone dialing
 7 system (“ATDS”) or an artificial or prerecorded voice without “the prior express consent of the
 8 called party,” and 2) calls placed to numbers listed on the DNC Registry. (*See generally id.*)

9 Williams sues PillPack personally and as the representative of a class of similarly situated
 10 persons. (Dkt. No. 6 at 5.) He claims PillPack is vicariously liable for the telemarketer’s
 11 violations of the TCPA because PillPack knowingly or willfully caused the autodialed calls to be
 12 made to his cell phone despite his lack of consent. (*Id.* at 3–4.) Williams seeks statutory
 13 damages under the TCPA. (*Id.* at 8.)

14 **A. Factual Background**

15 PillPack is a full-service pharmacy that delivers medications to customers’ homes. (Dkt.
 16 No. 62 at 1.) Part of its services include “multi-packing,” where the company groups a
 17 customer’s medications into distinct packs based on what days the customer is supposed to take
 18 them. (Dkt. No. 229-1 at 4–5.) In early 2018, PillPack engaged Performance Media to call
 19 potential customers (“leads”) and transfer leads who were interested in PillPack’s services to
 20 PillPack’s inbound call center. (Dkt. No. 62 at 2.) As part of the agreement between PillPack
 21 and Performance Media, Performance Media agreed that:

22 performance of the Services is in compliance with the Telephone Consumer
 23 Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227. All leads generated by Provider
 24 conform to the express written consent requirements of the TCPA. Provider shall

cause Provider's media sources to maintain documented evidence of consent for each lead and Provider shall promptly provide such documentation to PillPack, at any time and from time to time, upon request. Provider shall promptly report to PillPack any consumer revocation of consent of which it becomes aware, regardless of the time or manner in which such revocation of consent may be made.

(Dkt. No. 229-26 at 6.)

According to the contract, Performance Media was considered an independent contractor that was to "perform the Services under PillPack's general direction" and "in accordance with the terms of this Agreement," but Performance Media would "determine, in [its] discretion, the manner and means by which the Services are accomplished," subject to an "express condition that [Performance Media] will at all times comply with applicable law." (*Id.* at 8.)

Performance Media did not place any calls to generate leads. (Dkt. No. 253 at 14–15.) Instead, it contracted with Prospects DM to generate leads that would then be transferred to PillPack call centers. (Dkt. No. 37-17 at 5.) The calls "would be placed using a prerecorded voice system which is sometimes described . . . as an Avatar or an IVR (interactive voice response) system." (Dkt. No. 34 at 2.) The prerecorded message would start by saying that the agent's name was "John" and then describe how "one of our pharmacy partners" provided daily packets of pre-sorted medications prescribed to a patient. (Dkt. No. 229-22 at 2.) If the lead showed that they were interested in the service, the call would then be transferred to PillPack's call centers where a live sales agent would speak with the lead. As described by Prospects DM's owner, the script was intentionally vague because the call "could end up going to any potential pharmacy buyer" that was a client of Performance Media, not exclusively PillPack. (Dkt. No. 253 at 25.)

Like Performance Media, Prospects DM did not make any calls but contracted with one or more vendors to place calls. (Dkt. No. 253 at 8, 12, 15–16.) The record is still unclear

1 concerning how many vendors Prospects DM engaged to make calls on behalf of PillPack. (*Id.*
 2 at 29.) As understood by the Court, Prospects DM, or one of its vendors, would source leads and
 3 create call lists of participants based on their response to online “opt-in consent” forms on
 4 various websites where they agree to be contacted by email or an ATDS from various promoters.
 5 (Dkt. No. 64 at 1–10.) Prospects DM had “no direct control over the websites that [its] lead
 6 vendors use[d] to collect the data.” (Dkt. No. 37-17 at 6.) When the PillPack call center agents
 7 received the transferred calls they would be unable to identify which vendors placed the calls
 8 initially. (Dkt. No. 84 at 2.)

9 **B. The Williams Calls**

10 Williams received two calls from a prerecorded message that introduced itself as “John”
 11 with Senior Help Advisors, a Prospects DM business name. (Dkt. Nos. 30-6 at 2; 64 at 36.) The
 12 prerecorded message asked if anyone in the household used prescription medications, to which
 13 Williams responded “yes” both times. (Dkt. No. 64 at 36.) On both calls the prerecorded
 14 message explained that “[o]ne of our pharmacy partners makes managing your medications
 15 easy[,]” and described a multi-packing service that PillPack provides. (*Id.*) Once Williams
 16 responded “yes,” the prerecorded message responded “I’d like to transfer you to a pharmacy
 17 representative now to tell you more about the service. Is that okay?” (*Id.*) Once Williams
 18 confirmed that he wanted to be transferred, he was transferred to PillPack’s call center. (Dkt.
 19 No. 253 at 60.) On the March 14 call, Williams was transferred to a PillPack employee who
 20 identified the company by name and tried to sell PillPack’s services. (Dkt. No. 64 at 38.) On the
 21 April 10 call, Williams was transferred but never able to speak to anyone at PillPack. (Dkt. No.
 22 253 at 60.)

23 **C. Prospects DM’s Vendors**

1 After years of discovery, the Parties still do not know which of Prospects DM's vendors
 2 ("Unknown Vendor") placed the calls to Williams. It was originally understood by both parties
 3 that Prospects DM's vendors would source leads and then Prospects DM would place the calls
 4 on behalf of PillPack during the campaign. (*See generally* Dkt. Nos. 29, 60.) PillPack produced
 5 an opt-in consent form from someone named Michael Morgan, who consented to receive
 6 marketing calls on the phone number owned by Williams, by entering that phone number on the
 7 website www.sweepstakescentralusa.com, one of the websites Yodel Technologies, a Prospects
 8 DM vendor, used to source leads. (Dkt. Nos. 30-7 at 4; 64 at 1.)

9 Through discovery it was determined that Prospects DM hired vendors to make the calls
 10 on behalf of PillPack, including Yodel. (Dkt. No. 179-4 at 11–12.) But after additional
 11 discovery from Yodel, it was determined that Yodel's records of calls placed on behalf of
 12 PillPack did not include calls placed to Plaintiff's phone number. (*Id.* at 14–16.)

13 **D. Procedural Background**

14 On September 3, 2020, PillPack moved for summary judgment on the understanding that
 15 Prospects DM placed the calls to Plaintiff. (Dkt. No. 82.) On January 8, 2021, the Honorable
 16 Thomas S. Zilly denied PillPack's motion. (Dkt. No. 126.) Judge Zilly found genuine issues of
 17 material fact as to "whether Defendant gave actual authorization, express or implied, to
 18 Performance Media to allow a third party to make unlawful calls on Defendant's behalf" and
 19 "whether Defendant had actual knowledge of the third party's placement of calls using a
 20 prerecorded voice system." (*Id.* at 2–3.)

21 On July 24, 2020, Plaintiff moved to certify a class of individuals against PillPack. (Dkt.
 22 No. 29.) On February 12, 2021, Judge Zilly granted in part Plaintiff's motion for class
 23 certification. (Dkt. No. 140.) In his order, Judge Zilly found that Defendant did not "dispute that
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1 during the relevant period, the website opt-in forms failed to list ‘PillPack’ as a Marketing
 2 Partner who could call the proposed Class Members.” (*Id.* at 13.) Judge Zilly also rejected
 3 PillPack’s argument that it could “avoid TCPA liability so long as the called parties provided
 4 written consent to be called by Prospects DM, and that once called, the called party need only
 5 provide oral consent to be transferred to Defendant” as lacking statutory or regulatory support.
 6 (*Id.*) Even if the Court assumed that “written consent to be called by Prospects DM was
 7 sufficient for purposes of the TCPA,” PillPack still presented no evidence that the opt-in form
 8 “listed Prospects DM (or one of its fictitious names) as a Marketing Partner before the Class
 9 members were called.” (*Id.* at 14.) As such, Judge Zilly found that “Defendant has not
 10 identified a single instance in which a proposed Class member gave prior written consent” and
 11 therefore concluded that “the lack-of-consent issue has the capacity to generate a common
 12 answer” for the purposes of class certification. (*Id.*)

13 Other commonalities existed among the proposed class. For example, Judge Zilly found
 14 that “individual inquiry is not necessary to resolve whether the calls at issue were conducted
 15 using an ATDS or a prerecorded voice” because PillPack failed to “identify even one call in
 16 which a live voice was used exclusively” to contact leads. (Dkt. No. 140 at 15–16.) The Court
 17 found that “[f]rom the beginning of the Campaign, Defendant was aware that ‘an avatar
 18 recording’ was being used to make the calls” to potential customers. (*Id.* at 15.)

19 Based on the record before him, Judge Zilly certified the following class:

20 All persons or entities within the United States, whose telephone number was
 21 obtained by Prospects DM from Yodel Technologies, LLC or Fluent, Inc., and who
 22 between March 13, 2018, and June 16, 2019, received a non-emergency telephone
 23 call promoting goods or services on behalf of PillPack, LLC, as part of the PillPack
 24 Performance Media campaign:

- 25 (a) to a cellular telephone number through the use of an automatic telephone
 26 dialing system or an artificial or prerecorded voice; or

(b) to a cellular or residential telephone number that had been registered on the national Do Not Call Registry for at least 31 days and who received more than one call as part of the PillPack Performance Media campaign within any twelve-month period.

Transfers Sub-Class: All Class members who were transferred at least once to a PillPack call center on the Dialed Number Identification Service at: 866-298-0058.

(Dkt. No. 140 at 19.) Williams was appointed Class Representative. (*Id.*) The Court denied Plaintiff's motion to reconsider the Order certifying the class. (Dkt. Nos. 143, 144.)

As discussed above, it was later determined that Williams' phone number was not "obtained by Prospects DM from Yodel Technologies, LLC or Fluent, Inc." under the class definition, thus making him not a member of the class he represented. (Dkt. No. 178 at 12.) Williams moved to modify the class definition (Dkt. No. 178) while PillPack moved to decertify the class (Dkt. No. 187). The Honorable Robert J. Bryan denied Williams' motion and granted PillPack's, decertifying the class. (Dkt. No. 220.) Williams has now filed a renewed Motion for Class Certification (Dkt. No. 228) and Defendant has filed this Motion for Summary Judgment (Dkt. No. 252.)

III DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving party will bear the burden of proof at trial, the

1 moving party can prevail merely by pointing out to the district court that there is an absence of
 2 evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving
 3 party meets the initial burden, the opposing party must set forth specific facts showing that there
 4 is a genuine issue of fact for trial to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 5 242, 250 (1986). The court must view the evidence in the light most favorable to the nonmoving
 6 party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson Plumbing*
 7 *Prods.*, 530 U.S. 133, 150–51 (2000).

8 **B. Liability Under the TCPA**

9 Courts may hold sellers, like PillPack, vicariously liable for the TCPA violations of third-
 10 party callers “where the plaintiff establishes an agency relationship, as defined by federal
 11 common law, between the defendant and the third-party caller.” *Henderson v. United Student*
 12 *Aid Funds, Inc.*, 918 F.3d 1068, 1072 (9th Cir. 2019), *as amended on denial of reh'g and reh'g*
 13 *en banc* (May 6, 2019) (quotations omitted); *In the Matter of the Joint Petition Filed by Dish*
 14 *Network, LLC*, 28 F.C.C. Rcd. 6574, 6584 (2013) (“[W]e find that the seller may be held
 15 vicariously liable under federal common law principles of agency for TCPA violations
 16 committed by third-party telemarketers.”). Courts in the Ninth Circuit rely on the Restatement
 17 (Third) of Agency (“Restatement”) for common law agency principles. *Henderson*, 918 F.3d at
 18 1072–73.

19 A plaintiff can establish an agency relationship using the “bedrock theories of agency,”
 20 including actual authority, apparent authority, and ratification. *See Jones v. Royal Admin. Servs.,*
 21 *Inc.*, 887 F.3d 443, 449 (9th Cir. 2018); *see also Dish Network, LLC*, 28 F.C.C. Rcd. at 6584
 22 (“[A] seller may be liable for violations by its representatives under a broad range of agency
 23 principles, including not only formal agency, but also principles of apparent authority and

ratification.”). The party relying on an agency theory of liability bears the burden of establishing the existence of an agency relationship. Restatement § 4.06 cmt. b.

Williams argues PillPack is vicariously liable for Prospects DM’s Unknown Vendor’s TCPA violations under theories of actual authority, apparent authority, and ratification. (*See generally* Dkt. No. 254.) Whether PillPack was in an agency relationship with Prospects DM’s Unknown Vendor is a question of fact relevant to actual authority and ratification.

C. There is a Genuine Issue of Material Fact as to Whether Prospects DM’s Unknown Vendor was in an Agency Relationship with PillPack

“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement § 1.01. A key principle of any agency relationship is control, especially when determining whether vicarious liability exists. *See Jones*, 887 F.3d at 450 (“In determining whether vicarious liability may be imposed, the ‘extent of control exercised by the [principal]’ is the ‘essential ingredient.’”) (quoting *United States v. Bonds*, 608 F.3d 495, 505 (9th Cir. 2010) (alterations in original)). “[B]ut the content or specific meaning of the right varies.” Restatement § 1.01. “Thus, a person may be an agent although the principal lacks the right to control the full range of the agent’s activities, how the agent uses time, or the agent’s exercise of professional judgment.” *Id.*

“A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent’s principal and for whose conduct the appointing agent is responsible to the principal.” *Id.* § 3.15. An agent may appoint a subagent if the agent has actual or apparent authority from the principal to do so. *See id.*

Williams argues that “[a] reasonable jury could find that Performance Media was PillPack’s agent” and that “Performance Media’s vendors were PillPack’s subagents.” (Dkt. No. 254 at 18–21.) On PillPack’s previous motion for summary judgment, Judge Zilly determined that “Plaintiff’s evidence raises genuine disputes of fact on whether Defendant gave actual authorization, express or implied, to Performance Media to allow a third party to make unlawful calls on Defendant’s behalf.” (Dkt. No. 126 at 2.) The Court finds that PillPack has presented no new evidence or arguments to alter the Court’s previous decision.

1. There is a genuine issue of material fact as to whether Performance Media was PillPack's agent.

The Parties dispute whether PillPack exhibited the requisite control over Performance Media necessary for an agency relationship.¹ PillPack argues Performance Media was not its agent because the terms of their agreement identified Performance Media as an “independent contractor” that used its own discretion to perform the contracted services. (Dkt. No. 252 at 18.)

Whether Performance Media was labeled an independent contractor in the agreement with PillPack does not foreclose a finding that an agency relationship existed. *Henderson*, 918 F.3d at 1073 (“[W]hether an agency relationship exists is for a court to decide based on an assessment of the facts of the relationship and not based on how the parties define their relationship”) (citing Restatement § 1.02).

Citing *Jones*, PillPack argues that it “(i) had no day-to-day involvement with Performance Media, its subcontractor Prospects DM, or Prospects DM’s subcontractors, (ii) did not supervise how Performance Media, its subcontractor Prospects DM, or Prospects DM’s

¹ Based on the briefing before the Court, Judge Zilly presumed Performance Media was PillPack’s agent. (Dkt. No. 126 at 2.) As PillPack has made clear that it disputes that any agency relationship existed between PillPack and Performance Media, the Court addresses the issue here.

1 subcontractors did their work, and (iii) paid Performance Media based on successful transfers,
2 not hourly.” (Dkt. No. 252 at 18–19.) PillPack appears to rely on the ten-factor test created in
3 *Jones* for a finding of sufficient control over an agent. But PillPack’s reliance on this test is
4 misplaced as the Ninth Circuit made clear that the test was only relevant to the question of
5 vicarious liability via an employer relationship. *Jones*, 887 F.3d at 451 n.4 (“We emphasize that
6 our decision to adopt these Restatement factors is limited to the issue before the court. These
7 factors are of use for determining whether a principal, who has hired third-party telemarketers,
8 exercises sufficient control to be held vicariously liable under the TCPA *to the same degree that*
9 *an employer may be held liable for the actions of its employees.* . . . We express no opinion on
10 the usefulness of these factors in establishing other common law theories for holding a principal
11 liable for the conduct of its agent.”) (emphasis in original). As Williams does not allege such a
12 relationship, the *Jones* factors are not controlling. *See Brown v. DirecTV, LLC*, 562 F. Supp. 3d
13 590, 608 (C.D. Cal. 2021).

14 Williams has put forth evidence that PillPack could control the timing and volume of the
15 leads it received by communicating with Performance Media. (Dkt. Nos. 229-27; 98-13; 98-14;
16 98-15.) Williams also put forth evidence that PillPack had the ability to review the quality of
17 leads being received by PillPack. (Dkt. No. 255-3 at 6–8; *see generally* Dkt. No. 62.) The
18 evidence also suggests Performance Media would make changes to its services based on
19 feedback from PillPack. (*Id.*) Williams also puts forth evidence that PillPack participated in
20 approval of the script used by the avatar on the calls. (Dkt. Nos. 98-2 at 16–17; 229-5 at 22;
21 229-21 at 2.)

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1 Viewed in the light most favorable to Williams, Williams has put forth evidence raising a
 2 genuine issue of material fact whether PillPack exhibited sufficient control over Performance
 3 Media to make Performance Media its agent.

4 2. There is a genuine issue of material fact whether Prospects DM's
Unknown Vendor was a subagent of an agent of PillPack.

5 As previously noted, an agent may appoint a subagent to complete tasks that the agent
 6 has agreed to do on behalf of the principal. *See Restatement § 3.15.* An agent may appoint a
 7 subagent if the agent has actual or apparent authority from the principal to do so. *See id.* “If an
 8 agent acts without actual or apparent authority in purporting to appoint a subagent, the person so
 9 appointed is the agent solely of the appointing agent and is not the principal's subagent unless the
 10 principal ratifies the appointment.” *Id.* § 3.15 cmt c.

11 “An agent has actual authority to create a relationship of subagency when the agent
 12 reasonably believes, based on a manifestation from the principal, that the principal consents to
 13 the appointment of a subagent.” *Id.* A principal's consent to the appointment of a subagent may
 14 be express or implied. *Id.*

15 Williams argues that PillPack is vicariously liable for Prospects DM's Unknown
 16 Vendor's TCPA violations because the Unknown Vendor was PillPack's subagent. (Dkt. No.
 17 254 at 20–21.) According to Williams, “the evidence shows that Performance Media reasonably
 18 believed PillPack consented to Performance Media appointing Prospects and its vendors to place
 19 the calls.” (*Id.* at 20.) PillPack argues that Prospects DM's Unknown Vendor could not be
 20 PillPack's subagent because there is no evidence Performance Media controlled the Unknown
 21 Vendor or that Prospects DM was in an agency relationship with PillPack. (Dkt. No. 257 at 7–
 22 8.)

1 Williams has put forth evidence that the contract between PillPack and Performance
2 Media allowed Performance Media to use “agents” and “contractors” to carry out its duties on
3 behalf of PillPack. (Dkt. No. 229-26 at 5–7.) Williams has also put forth deposition testimony
4 of Christina Anderson, a third-party who introduced PillPack to Performance Media. (See Dkt.
5 No. 229-7.) Ms. Anderson testified that she was on calls with representatives from PillPack and
6 Performance Media where Josh Grant, CEO of Prospects DM, was on the call and that
7 Performance Media introduced Grant to PillPack as the entity that would be placing the calls on
8 behalf of PillPack. (*Id.* at 15–17.) Williams has also put forth an email from Mark Dorf, CEO of
9 Performance Media, to Grant explaining that Dorf spoke to PillPack about using Prospects DM’s
10 “offshore and onshore” vendors and PillPack was “ok with using the offshore [vendors] only to
11 keep the cost down[.]” (Dkt. No. 98-8 at 2.) PillPack was also aware at least some calls were
12 being made on behalf of “Helping Hands,” a DBA of Yodel. (Dkt. No. 255-3 at 13.)

13 Viewed in the light most favorable to Williams, the communications between PillPack,
14 Performance Media, and Prospects DM could give the reasonable impression that PillPack gave
15 authority to both Performance Media and Prospects DM to hire subagents to carry out the media
16 campaign on behalf of PillPack. As a result, if a jury finds that PillPack and Performance Media
17 were in an agency relationship, a jury could also find that PillPack authorized Performance
18 Media to engage Prospects DM and its subcontractors, and PillPack accepted the legal
19 consequences of their actions.

20 **D. There is a Genuine Issue of Material Fact as to Whether Prospects DM’s
21 Unknown Vendor Had Actual Authority to Make the Calls to Williams**

22 To establish actual authority under the TCPA, plaintiffs must not only establish an
23 agency relationship, “[t]hey must also establish actual authority to place the unlawful calls.”
24 *Jones*, 887 F.3d at 449. “An agent acts with actual authority when, at the time of taking action

1 that has legal consequences for the principal, the agent reasonably believes, in accordance with
 2 the principal's manifestations to the agent, that the principal wishes the agent so to act."

3 Restatement § 2.01. Actual authority is limited to actions "specifically mentioned to be done in a
 4 written or oral communication" or "consistent with" a principal's "general statement of what the
 5 agent is supposed to do." *Jones*, 887 F.3d at 449 (quoting *Salyers v. Metro. Life Ins. Co.*, 871
 6 F.3d 934, 940 (9th Cir. 2017)).

7 As discussed above, there is a genuine dispute of material fact as to whether the party
 8 placing the calls to Williams was in an agency relationship with PillPack. *See supra* Section
 9 III.C. PillPack also moves for summary judgment arguing that the Unknown Vendor that placed
 10 the calls to Williams did not have actual authority to make calls in violation of the TCPA. (Dkt.
 11 No. 252 at 17–22.)

12 Williams argues that PillPack's conduct gave Performance Media, and its subagents,
 13 implied actual authority to make calls in violation of the TCPA. (Dkt. No. 257 at 21–24.)
 14 PillPack argues that neither Performance Media, Prospects DM, or its vendors had actual
 15 authority to place the unlawful calls on behalf of PillPack. (Dkt. No. 252 at 15–21.) Citing
 16 *Jones*, PillPack argues the express terms of the agreement between PillPack and Performance
 17 Media forecloses a finding of express authority to make calls in violation of the TCPA. (*Id.* at
 18 17–19.) PillPack also argues that none of its words or actions could have been reasonably
 19 interpreted to give Prospects DM, or its vendors, implied actual authority to make calls in
 20 violation of the TCPA. (Dkt. No. 257 at 8–11.)

21 Williams has put forth evidence that PillPack authorized the use of prerecorded messages
 22 on the calls to leads. (Dkt. Nos. 229-18; 255-3 at 3–4.) Williams has also put forth evidence that
 23 some leads were being called that had not given PillPack express consent to call them. (Dkt. No.
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1 229-5 at 17–20.) If these two practices were used on the same lead that would violate the TCPA.
 2 (See Dkt. No. 140 at 13–14.) Thus, there is a genuine issue of material fact whether the
 3 Unknown Vendor who placed the calls to Williams had implied actual authority to place the calls
 4 to leads using an avatar or prerecorded message without obtaining prior express written consent.

5 PillPack relies on *Jones* in arguing that the agreement between PillPack and Performance
 6 Media forecloses a finding of actual authority because it required Performance Media and its
 7 agents to comply with the TCPA. (Dkt. No. 252 at 18.) In *Jones*, the contract between the
 8 defendant and its agent “expressly prohibited any act or omission that violates applicable state or
 9 Federal law, including but not limited to robo-calling.” 887 F.3d at 449 (internal quotation
 10 marks omitted). But the Ninth Circuit also found that plaintiffs failed to point to any evidence on
 11 the record “contradicting this limitation” on the agent’s authority. *Id.* *Jones* does not foreclose
 12 the possibility that PillPack made other implied manifestations to Performance Media or any
 13 subagents that they reasonably believed gave them authority to make calls in violation of the
 14 TCPA.

15 Similarly, the Court is not persuaded by PillPack’s reliance on *Abante* and *Makaron* that
 16 an agreement to provide TCPA compliant leads forecloses the possibility of actual authority to
 17 make calls in violation of the TCPA. In both *Abante* and *Makaron*, the plaintiffs failed to put
 18 forth any evidence rebutting the understanding that the lead generation activities would comply
 19 with federal law. *Abante Rooter & Plumbing, Inc. v. Arashi Mahalo, LLC*, 2019 WL 6907077,
 20 at *1 (N.D. Cal. Dec. 19, 2019); *Makaron v. GE Sec. Mfg., Inc.*, 2015 WL 3526253, at *6 (C.D.
 21 Cal. May 18, 2015). *Abante* is also factually distinct because actual authority was not a theory of
 22 vicarious liability raised by the plaintiff, in part because there was “unrebutted evidence” that the
 23 lead generator “repeatedly represented that its services were compliant with the TCPA.” *Abante*,

1 2019 WL 6907077, at *1. In *Makaron*, the only evidence of defendant's control over the agents
 2 were the agreements for the licenses for its authorized dealers that required compliance "with all
 3 local, state, and federal laws in their marketing and sales tactics." *Makaron*, 2015 WL 3526253,
 4 at *6. Unlike the plaintiffs in either of those cases, Williams has put forth evidence rebutting
 5 PillPack's contention that it only authorized TCPA-compliant leads.

6 Thus, the Court finds that there is a genuine issue of material fact as to whether Prospects
 7 DM's Unknown Vendor acted with actual authority in making the calls to Williams.

8 **E. There is a Genuine Issue of Material Fact as to Whether PillPack Ratified the
 9 Conduct of Prospects DM's Unknown Vendor**

10 "Ratification is the affirmation of a prior act done by another, whereby the act is given
 11 effect as if done by an agent acting with actual authority." Restatement § 4.01. Ratification
 12 occurs when the principal accepts the benefit of the agent's act either with actual knowledge of
 13 the material facts or with "knowledge of facts that would have led a reasonable person to
 14 investigate further, but the principal ratified without further investigation." *Henderson*, 918 F.3d
 15 1075 (quoting Restatement § 4.06 cmt. d). The latter is also described as "willful ignorance."

16 *Id.*

17 To prove knowing acceptance, there must be "an objectively or externally observable
 18 indication . . . that the principal has exercised choice and has consented" to the acts of the
 19 purported agent. Restatement § 4.01 cmt. d. Consenting to the act requires the principal have
 20 "knowledge of material facts," or "actual knowledge." *Id.* § 4.06.

21 A principal that is "willfully ignorant" might not know the material facts but ratifies
 22 "with awareness that such knowledge was lacking." *Id.* § 4.01 cmt. b. "In effect, the principal
 23 can ratify the act of a third party—thereby making the third party the principal's agent—even if
 24

1 it does not know all the material facts, but it must be aware that it does not know the material
 2 facts and ratify anyway.” *Henderson*, 918 F.3d at 1074.

3 Williams argues a reasonable jury could conclude that PillPack ratified the conduct of
 4 Prospects DM’s Unknown Vendor because PillPack “had actual knowledge that the calls were
 5 placed without the prior express consent required by the TCPA.” (Dkt. No. 254 at 28.)
 6 Alternatively, Williams argues “[t]here were numerous ‘red flags,’ that should have led PillPack
 7 to investigate whether Performance Media or its subagents obtained prior express written
 8 consent.” (*Id.*)

9 PillPack argues PillPack never ratified Prospects DM’s Unknown Vendor’s activity
 10 because: 1) the calls placed to Williams were not a ratifiable act, 2) PillPack had no knowledge
 11 or inquiry notice that Prospects DM’s vendor was transferring calls to PillPack in violation of the
 12 TCPA, and 3) PillPack received no benefit from the calls to Williams. (Dkt. No. 252 at 24–29.)

13 “A person may ratify an act if the actor acted or purported to act as an agent on the
 14 person’s behalf.” Restatement § 4.03. As there is a genuine issue of material fact whether
 15 Prospects DM’s Unknown Vendor was in an agency relationship with PillPack, the Court will
 16 not grant PillPack’s motion on this point.

17 PillPack also disputes that there is sufficient evidence to find that it had actual knowledge
 18 or was on inquiry notice that the calls being transferred to it were placed in violation of the
 19 TCPA. As Judge Zilly’s prior Order explained, PillPack knew that at least some leads
 20 transferred to its call centers were called on behalf of PillPack without first giving proper consent
 21 under the TCPA. (Dkt. No. 140 at 13–14.) Williams’ Opposition has put forth evidence
 22 supporting this finding. (Dkt. Nos. 255-3 at 13; 229-5 at 18–20.) Williams has also put forth
 23 evidence that PillPack knew that a prerecorded voice would be used in the calls to leads. (Dkt.
 24

1 Nos. 229-5 at 9–10, 29; 229-9 at 3–4; 229-18; 255-3 at 6–7.) Viewing this evidence in the light
 2 most favorable to Williams, a triable fact remains as to whether PillPack “had knowledge of facts
 3 that would have led a reasonable person to investigate further.” *Henderson*, 918 F.3d at 1076
 4 (quoting Restatement § 4.06 cmt. d).²

5 PillPack makes the argument that it did investigate complaints from leads and thus could
 6 not have been willfully ignorant of unknown vendors’ behavior. (Dkt. No. 252 at 28.) In
 7 support, PillPack cites an email exchange between PillPack and Performance Media where
 8 PillPack raises complaints from leads that say they are receiving robocalls. (Dkt. No. 62 at 8.)
 9 However, this evidence does not establish that PillPack was assured that the campaign run by
 10 Performance Media and its vendors complied with the TCPA. Rather, this email indicates merely
 11 that Performance Media reassured PillPack that all leads being transferred to it had shown they
 12 wanted to be transferred to PillPack. (Dkt. No. 62 at 8.) The email exchange between
 13 Performance Media and PillPack cited in support for PillPack’s due diligence also does not
 14 support PillPack’s contention for similar reasons. (*See, e.g.*, Dkt. No. 62 at 5–8.) Whether by
 15 design or oversight, the relationship between PillPack, Performance Media, and the vendors
 16 making the calls prevented PillPack from being alerted to any issues of leads being contacted
 17 without TCPA-compliant consent. When PillPack’s call center received a call, it would not
 18 know which entity made the call on PillPack’s behalf. (Dkt. No. 84 at 2.) And if that lead
 19 complained that it had not given proper consent, it would not have been transferred to PillPack
 20 unless it affirmatively said it was interested in PillPack’s services. (Dkt. No. 85 at 1–2.)
 21 PillPack claims it kept a list of complaints made by leads, but those complaints were only written
 22

23 ² Unlike the lenders in *Kristensen v. Credit Payment Servs. Inc.*, Williams has put forth evidence
 24 that PillPack assumed the risk of lack of knowledge but ratified unlawful calls anyway. 879 F.3d
 1010, 1015 (9th Cir. 2018).

1 down if they complained of being transferred to PillPack from the vendor, not that the vendor
 2 was called without express consent under the TCPA. (Dkt. No. 62 at 2.)

3 PillPack also argues that it did not ratify the conduct of Prospects DM's vendors because
 4 it did not receive any benefit from Williams' calls. (Dkt. No. 252 at 28–29.) For ratification to
 5 occur, there must be "knowing acceptance of the benefit." *See Henderson*, 918 F.3d at 1073
 6 (quoting Restatement § 401 cmt. d). Williams argues PillPack has continued to accept thousands
 7 of leads from Performance Media despite consumer complaints. (Dkt. No. 254 at 30.) Williams
 8 argues that under *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, 2018 WL 3707283, at *5
 9 (N.D. Cal. Aug. 3, 2018), and *Aranda v. Caribbean Cruise Line, Inc.*, 179 F. Supp. 3d 817 (N.D.
 10 Ill. 2016), such evidence presents a jury question on ratification under an "acceptance of
 11 benefits" theory.

12 PillPack accurately responds that in those cases the class was already certified in the
 13 cases cited by Williams. But the inquiry does not end there. Williams has put forth evidence
 14 that PillPack accepted at least one of the calls made to Williams. (Dkt. No. 64 at 36–40.)
 15 PillPack has put forth no binding authority that a benefit under a theory of ratification must result
 16 in the purchase of goods or services. From the Court's perspective, when it accepted the transfer
 17 of the first Williams call PillPack believed it was speaking with a potential buyer of PillPack
 18 products. There is at least some benefit to speaking with a lead as PillPack was paying
 19 Performance Media for successful transfers to its call centers, regardless of whether those leads
 20 turned into actual sales. (Dkt. No. 37-13 at 2–4.)

21 Thus, the Court finds there is a genuine issue of material fact as to whether PillPack
 22 ratified the conduct of Prospects DM's Unknown Vendor.

1 **IV CONCLUSION**

2 Accordingly, and having considered Defendant's motion (Dkt. No. 252), the briefing of
3 the parties, and the remainder of the record, the Court finds and ORDERS that Defendant's
4 Motion for Summary Judgment is DENIED.

5 Dated this 5th day of December 2022.

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8 David G. Estudillo
9 United States District Judge
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